

Anti-money laundering: guidelines for Chartered Secretaries

If you are still labouring under the delusion that money laundering is an issue solely for banks, now might be a good time to wake up. While banks are still clearly important in the fight against money laundering, there is increasing recognition that professionals, particularly Chartered Secretaries working in the corporate services sector, are becoming the first line of defence in the fight against money laundering. Last month, the HKICS published guidelines intended to give practical guidance to its members on what steps to take to avoid being party to money laundering and to ensure suspicious transactions are reported.

Since 2003 the Financial Action Task Force (FATF) on money laundering – the inter-governmental body set up to combat money laundering in 1989 – has focused on the misuse of corporate entities for money laundering purposes and on the role of lawyers, accountants and trust and company service providers (TCSsPs), many of whom are company secretaries, in facilitating the use of such corporate entities. There is an increasing recognition that these professionals are becoming the first line of defence in the fight against money laundering. This is because tougher anti-money laundering (AML) due diligence measures among banks have increased the likelihood that money launderers will come to company service providers first. Money launderers often seek to disguise the beneficial ownership of their illicit funds through the use of complex corporate structures and trusts. Setting up these structures can be a core part of the services that company secretaries provide.

In November last year, FATF carried out an audit of Hong Kong's current AML defences and one weakness identified by the FATF evaluation team – the fact that AML regulations have not yet been extended to non-financial businesses and professions – is now being addressed by the Hong Kong government. It intends to draft legislation to ensure that non-financial businesses and professions perform proper anti-money laundering due diligence. The legislation will be based closely on the existing FATF AML standards and will include provisions on customer due diligence, record keeping and suspicious transaction reports.

The new *Anti-Money Laundering & Counter-Terrorist Financing Guidelines* issued by the HKICS last month give, among other things, practical guidance on these three areas.

1. Customer due diligence: scepticism is healthy

Guidelines are guidelines, they cannot spell out how to behave in every conceivable situation company secretaries might encounter. As is pointed out in the general overview of the Guidelines, there is no single equation or set of rules you can use to guarantee the detection of money laundering or terrorist financing, or to guard yourself against being taken in by it. 'The best tactics are to apply common sense, based on a knowledge of the industry, with an enquiring mind laced with a healthy amount of commercial cynicism,' the Guidelines state.

The Guidelines stress, however, that the key to all anti-money laundering and counter-terrorist financing systems is the 'know your customer' (KYC) principle. 'You will be better placed to identify suspicious transactions if you know your client and understand the reasoning behind the services they want from you,' the Guidelines state. KYC applies to the beginning of a new relationship with a client, and also as a continuing obligation. You need to have internal procedures in place to properly and accurately identify customers. The identification procedure should allow you to satisfy yourself, in the reasonable and objective view of a third party, of the true identity of your client and its beneficial owner. Establishing the true identity of a client requires some form of reliable verification of identity through independent evidence.

The Guidelines also emphasise that client identification should be a real and active process. The perfunctory check of a fourth generation photocopy of an identity card so as to be able to tick-off a box on a file opening form is not a proper and reasonable approach to KYC. The Guidelines urges Chartered Secretaries to

ask for an original document; to compare the photograph to the real person; and to look for any tampering with the document offered by the client. While you are not expected to be a forensic expert, you should not overlook obvious forgeries or questionable documentation.

Identifying beneficial ownership is not always easy, of course, and this was an issue raised by attendees at last month's Annual Corporate and Regulatory Update (ACRU). The speakers from the Hong Kong Monetary Authority who spoke on AML and CTF at the ACRU seminar stressed that 'beneficial owners' are defined as natural persons, and the new HKICS Guidelines stress that you need to look beyond any structures – such as nominee shareholders and bearer shares – obscuring the identities of the individuals with beneficial ownership.

The Guidelines also address the situation where customers are introduced by intermediaries – such as law firms, accountants or others. They stress that where intermediaries are relied upon to perform customer due diligence, the ultimate responsibility for proper and proportionate due diligence and for effective customer identification remains with you. For this reason, the Guidelines recommend that before relying on an intermediary, you should be satisfied of all of the following:

1. that the intermediary's customer due diligence procedures are as stringent as your own
2. that the intermediary's customer due diligence systems are reliable, and
3. that you will be permitted to verify the intermediary's customer due diligence at any stage.

The Guidelines add that you should review the intermediaries regularly to ensure that they continue to be reliable intermediaries.

2. Record keeping: the legal requirements

The two principal statutes relevant to money laundering are the Drug Trafficking (Recovery of Proceeds) Ordinance (DTRPO) and the Organised and Serious Crimes Ordinance (OSCO). Both ordinances entitle the court to examine all relevant past transactions to assess whether a defendant has benefited from any of the indictable offences. Subject to any other statutory requirements, a company or professional firm should keep the following records for at least six years after the end of the business relationship (or after the conclusion of any investigation carried out by the authorities into the client):

1. records on the risk profile of each customer
2. data obtained from the customer due diligence process
3. copies of official identification documents
4. all necessary records on both domestic and international transactions sufficient to permit reconstruction of individual

5. transactions
6. the client engagement letter and service contract, and
7. financial documentation relating to the client and transactions.

Documents may be retained in the following formats:

1. original documents
2. hard copies
3. on microfiche, or
4. in computerised form.

3. STRs: encouraging reports

The DTRPO and OSCO provide for two distinct forms of criminal liability in terms of money laundering. The first is actually being involved in laundering money, the second is failing to report to the authorities property which you know or suspect to be representing the proceeds of crimes. At last month's ACRU seminar, Raymond Chan, Division Head, Banking Policy Department, HKMA, pointed out that very few suspicious transaction reports (STRs) are made by secretarial companies – five such STRs were made in 2007.

The Guidelines give practical guidance on how to identify suspicious transactions and, having done so, how to make a report to the authorities so that they can investigate. The obligation to report money laundering activities is laid down in s 25A(1) of both the OSCO and the DTRPO, which are largely identical. The section states that:

'Where a person knows or suspects that any property:

- (a) in whole or in part directly or indirectly represents any person's proceeds of
- (b) was used in connection with, or
- (c) is intended to be used in connection with,

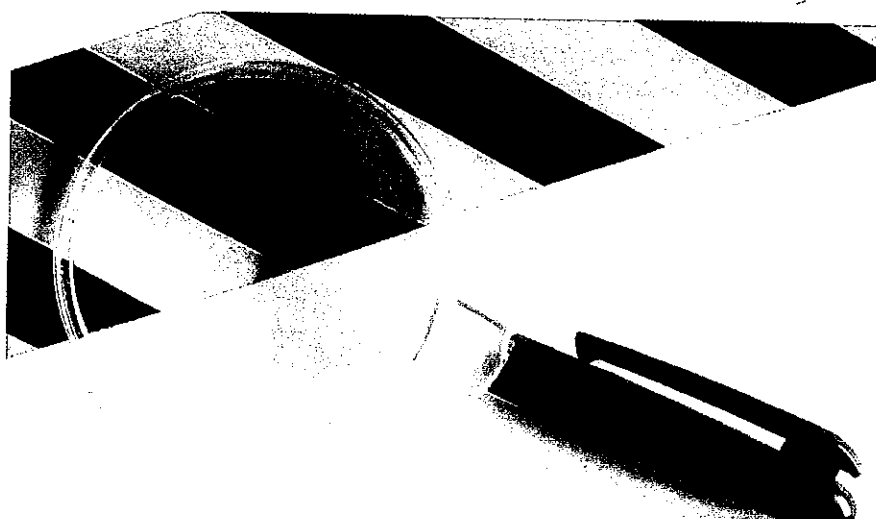
an indictable offence/ drug trafficking, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorised officer.'

The authorised officer referred to here means any police officer, or any member of the Customs and Excise Department. In practice, however, reports in Hong Kong are made to the Joint Financial Intelligence Unit (JFIU), which is jointly operated by the Hong Kong Police and the Hong Kong Customs and Excise Department. Full details on making a report on a suspicious transaction can be found at the JFIU website: www.jfiu.gov.hk.

The Guidelines recommend that the following steps be taken to assess whether a transaction is suspicious and whether any report should be made under s 25A(1):

- screen the information available (including information obtained from customer due diligence and subsequent activities of the client) to see if there are any suspicious activity indicator(s)
- ask the client appropriate questions to

'the best tactics are to apply common sense, based on a knowledge of the industry, with an enquiring mind laced with a healthy amount of commercial cynicism'



'the perfunctory check of a fourth generation photocopy of an identity card so as to be able to tick-off a box on a file opening form is not a proper and reasonable approach to KYC'



- obtain further information
- review all the information that you have to decide whether the apparently suspicious activity is to be expected, and
- evaluate the profile of the client against the past and/ or proposed activities.

If the evaluation results in activities being considered suspicious, you should make a report to JFIU (through your compliance officer if there is one). A person who fails to make a report when there is an obligation under s 25A(1) commits an offence and is liable to a maximum penalty of three months' imprisonment and a fine of HK\$50,000.

Summing up: system support


This article has highlighted some of the key areas covered by the new HKICS Guidelines, but AML and CTF issues are of course very broad in scope. The Guidelines provide

HKICS members with practical guidance on a wide range of AML/ CTF issues. There are examples of suspicious transactions; practical examples of implementing the core counter-measures; a detailed examination of AML and CTF legislation in Hong Kong; and a list of useful websites.

Another important area covered by the Guidelines is the need for effective AML/ CTF internal controls. 'Anti-money laundering and counter-terrorist financing measures are a risk-based discipline,' the Guidelines state, 'you should develop internal systems to address your own risk profile in terms of exposure to money laundering and terrorist financing transactions.'

The Guidelines recommend:

1. a clear statement in writing of policies and procedures in relation to money laundering and terrorist

2. financing which management and all employees must follow policies should include all of the following, which form the foundation of any adequate anti-money laundering/ counter-terrorist financing system:
 - (a) customer due diligence
 - (b) record keeping
 - (c) identification of suspicious transactions, and
 - (d) reporting of suspicious transactions
3. employee training
4. promotion of co-operation with law enforcement authorities
5. verification of compliance with internal policies and procedures, and
6. regular review of the policies and procedures to be up to date with the law and practice. 

Source: HKICS

The HKICS Anti-Money Laundering and Counter-Terrorist Financing Guidelines are not a definitive guide nor are they intended to replace seeking legal advice in particular circumstances. The full text of the Guidelines can be found in the 'Publications' section of the HKICS website (www.hkics.org.hk).

The Institute of Chartered Secretaries and Administrators (ICSA) has also published new guidelines on compliance with money laundering regulations. The new guidance note, published on 4 April 2008, is available on the ICSA website (www.icsa.org.uk).

UK salary survey

A new survey carried out by the UK recruitment firm CSS reveals that remuneration at the very top of the Chartered Secretarial profession in the UK is extremely healthy, with 40 per cent of respondents at Company Secretary level in the FTSE 100 earning over £200,000 a year. The form of remuneration is changing, however, with more company secretaries in the UK's top companies receiving more of their overall reward in the form of bonuses. This, the survey reckons, supports the view that businesses are increasingly acknowledging the commercial value of the role.

Additionally, the survey notes that more respondents than ever before hold a first degree, suggesting that a company secretarial career is becoming more appealing to graduates – both those who

have studied law at university and graduates from other disciplines. CSS Director Caroline Evans firmly believes that the company secretarial profession is in the ascendant. 'The increasing importance of good corporate governance and its high profile as a business issue is creating a real opportunity for able individuals already within the field to leverage their commercial value and better negotiate for the working lifestyle they want'.

The survey, which is carried out annually by CSS, also found that 37 per cent of respondents now have the option of flexible working. The survey calls this 'an encouraging statistic', and suggests that the development has 'real advantages' for both employers and employees by making company secretarial careers 'accessible to a more diverse population' and improving retention.

New incorporation arrangements to commence 11 July

The Secretary for Financial Services and the Treasury has made 11 July the commencement date for the provisions concerning the introduction of new incorporation forms for incorporating a company under the Companies (Amendment) Ordinance 2004. Under the Companies (Amendment) Ordinance 2004, new incorporation forms will be introduced for use when a person applies to the Registrar of Companies to form an incorporated company in Hong Kong. The new form streamlines incorporation procedures, since any person who wishes to incorporate a company will only have to submit one incorporation form together with a certified copy of the M&A of the company. To tie in with the introduction of the new incorporation form, new fees will be prescribed at the same time in the

Eighth Schedule to the Companies Ordinance for conducting searches with respect to the incorporation forms.

The Secretary for Financial Services and the Treasury has also designated the same date as the commencement date for the provision relating to the expansion of the index of directors to cover 'reserve directors' in the Companies (Amendment) Ordinance 2003. In connection with the commencement of this provision, the scope of the index of directors under the Companies Ordinance, which is available for public inspection on payment of the prescribed fees, will be expanded to cover any person who is nominated by a one-member company in general meeting to act in place of the sole director of the company upon the latter's death, that is a reserve director.

Disclosure of interests requirements: exemption proposal

The SFC proposes to exempt SFC-authorized open-ended collective investment schemes organised in corporate form and listed on the Stock Exchange of Hong Kong from the disclosure of interests requirements of the Securities and Futures Ordinance. A corporate form collective investment scheme listed on the Stock Exchange, such as an Exchange Traded Index-tracking Fund (ETF) in corporate form, is technically a listed corporation under Part XV of the SFO. That means its corporate insiders come under the disclosure obligations under Part XV. Part XV requires corporate insiders (that is, substantial shareholders, directors, shadow directors and chief executives of a listed corporation) to give notice of their interests to the listed corporation and the Stock Exchange on occurrence of certain events.

At present there are no ETFs listed in Hong Kong which have been structured in corporate form. Since this structure is common in other jurisdictions, the proposed amendment will assist the development of Hong Kong's ETF market by facilitating the listing of ETFs in different forms. This proposal will also bring Hong Kong's regulatory requirements in line with international standards and practices in this area.

The proposed amendments will be made to the 'Guidelines for the Exemption of Listed Corporations from Part XV of the Securities and Futures Ordinance (Disclosure of Interests)' and are set out in a consultation paper issued by the SFC last month. Following the consultation, the SFC will publish a conclusions paper to summarise the views collected and set out the final proposal.

The consultation paper is available on the SFC website at: www.sfc.hk.